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Draft Convention on Assignment of Receivables in International Trade

Compilation of comments by Governments and international organizations

Addendum

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I. Introduction

This note reproduces comments on the draft Convention on Assignment of Receivables in International Trade received subsequently to the comments reproduced in documents A/CN.9/490, A/CN.9/490/Add.1 and A/CN.9/490/Add.2. Further comments will be issued, if possible, as addenda to this note and in the order they are received.

II. Compilation of comments

Germany

[Original: English]

General comments

The Federal Republic of Germany welcomes the continuation of discussions on the Draft Convention on Assignment of Receivables in International Trade. The Federal Republic should

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like to express its gratitude to all participants, and especially to the UNCITRAL Secretariat, for the preliminary work carried out and for the positive spirit in which the discussions were conducted.

Specific comments

Relationship with other texts: At present, there are numerous projects in the international and European arenas designed to unify substantive and private international law in respect of the law on assignment of receivables and of secured credit law in general. By way of example, reference may be made here not only to the UNIDROIT Convention on International Interests in Mobile Equipment but also to the work of the Hague Conference concerning the draft Convention on the law applicable to dispositions of securities held through indirect holding systems. In addition to those texts, there is the European Council Directive on settlement finality in payment and securities settlement systems and also the prospective directive on the use of securities as collateral for credit.

The Federal Republic of Germany is concerned about the fact that the interrelationship of these various projects has not yet been clarified. The current projects differ in their approaches because in some cases they differentiate according to collateral and in others according to transferor or transferee. Here there is no failure to appreciate the fact that the UNCITRAL Convention has a more extensive scope of application. Furthermore, the Federal Republic of Germany sees an urgent need for consultation to avoid contradictions between the provisions concerned.

Articles 1 to 17: Articles 1 to 17 of the Convention have already been discussed by the Commission and have been accepted in principle. Discussions should not be resumed here unless there is a compelling reason for doing so.

There are, however, misgivings as to whether the definition in respect of the "location" of person to whom the Convention is intended to apply takes adequate account of the needs arising. According to article 5 (h) a person is located in the State in which it has its "place of business". If the assignor or the assignee have places of business in more than one State, the place of business is where the assignor or the assignee has its central administration. This provision overlooks the fact that, for instance, providers of financial services (banks) make assignments in many locations in various countries where there is no connection at all with the central administration and therefore with the law of the place of central administration. This problem is becoming increasingly relevant in the European Union where not only banks or insurers but also other large enterprises with a chief executive office in one member conduct business through legally dependent structures in other member States of the European Union. The Federal Republic of Germany therefore considers it necessary for the present provision made in article 5 (h), third sentence, to be applied not only to the debtor but also in general terms to assignors and assignees.

Article 19: The delegation of the Federal republic of Germany has repeatedly expressed its concern that article 19 might considerably decrease the level of debtor protection existing under national law. The Working Group did not share this concern. The Commission should therefore have a renewed discussion of the problems emanating from article 19, paragraphs 5 to 7.

Consumer protection: In the foregoing context, but not only confined to article 19, there should be also a discussion of the question whether and to what extent the rules of domestic or of Community law relating to consumer protection take precedence over the provisions of the Convention.

Article 24: The Federal Republic of Germany is not convinced that the provisions concerning priorities in respect of proceeds are adequate. Article 24 paragraph 1 (b) is difficult to understand and will hardly help in practice. The problems become apparent if article 24 of the Convention is compared with article 4 of the Hague Conference draft Convention on the law

applicable to dispositions of securities held through indirect holding systems. Here there is the risk of contradictory provisions and interpretations.

Against this backdrop, consideration must be given to whether a provision on rights to proceeds should be included in the Convention. The Federal Republic of Germany sees no need for article 24 paragraph 1 (b).

Article 39: Contrary to the express proposals made by the German delegation, article 39 has been formulated as an opt-out rule and not as an opt-in rule for the application of chapter V. This may not represent a great difference. Nevertheless, this is significant for the Convention's acceptability to States that may not need chapter V.

Independently of this matter, it is suggested that in article 39 provision also be made for Contracting States to adopt only parts of chapter V. This change would seem to be important particularly in regard to the content of article 30, but also in regard to the content of articles 32 and 33.

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